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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 578

HEARST CONSOLIDATED PUBLICATIONS, INC., THE HEARST CORPORATION and IGOR CASSINI,

Petitioners,

—v.—

FREDERICK H. HOPE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinion Below

No opinion was rendered by the trial Court after the verdict of the jury. The opinion of the Court of Appeals for the Second Circuit (App., pp. A-1 to A-24) is reported at 294 F. 2d 681.

Question Presented

Whether the trial Court properly admitted certain evidence in accordance with Rule 43(a) of the Federal Rules of Civil Procedure, although such testimony would have been excluded by the state court.

Rule of Civil Procedure Involved

Rule 43(a), F. R. Civ. P., provides as follows:

"RULE 43 EVIDENCE

"(a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Statement

The action is one in defamation based upon an article appearing in the "Cholly Knickerbocker" column and published in the Hearst newspapers and elsewhere, with a circulation of between 10 million and 20 million readers (R., 189a). After a plenary trial, the jury awarded plaintiff a verdict against all of the defendants for compensatory and punitive damages in the total sum of $58,500. (R., 262a).

Argument

The applicable questions of fact and law are fully set forth in the opinion of the Court of Appeals printed in the Appendix at pages A-1 to A-25. Such opinion is so thorough in content and annotation that further comment by us is

needless—indeed, presumptuous. Accordingly, we will limit this brief to a specific reply to the four reasons advanced by petitioners for the granting of the instant writ.

The first reason, in substance, invokes the outcome-determinative principle as laid down in *Guaranty Trust Co. v. York*, 326 U. S. 99, 109.

Petitioners' first error is in their assumption, without more, that if the testimony which was admitted by the trial Court, had been excluded, the jury would have brought in a verdict for the defendants-petitioners herein. The subject evidence was brought out by six questions. Notwithstanding such evidence, there was much other testimony adduced on behalf of plaintiff from which the jury could have reasonably inferred that plaintiff was the person referred to in the article complained of.

Petitioners' second error is in their contention that the subject evidence should have been excluded by reason of the *Guaranty Trust Co. v. York* doctrine because such testimony would not have been admissible in the New York State court. It is well settled that the mere fact that testimony is not admissible in the state court is not grounds for excluding it in the federal court. The opinion of the Court of Appeals well documents this proposition. In *Guaranty Trust Co. v. York*, the specific question was whether the federal court was bound to apply a statute of limitations which would have been applied in the state court. Failure to apply the statute of limitations undoubtedly brought about a different result than would have been achieved had the action been tried in the state court. The factual situation in the instant case is not even remotely analogous to the *Guaranty Trust Co.* case. Such is the holding of the Court of Appeals. For it is most significant that despite the dissenting opinion, that Court refused to grant a rehearing (p. A-26), and that not one member of the Court of Appeals for the Second Circuit, including the dissenting Judge, considered the matter worthy of a rehearing in banc (p. A-26).

The second reason advanced by petitioners is that Rule 43(a) of the Federal Rules of Civil Procedure has been overruled, modified or limited by the decision of *Erie* v. *Tompkins*, 304 U. S. 64, inasmuch as such rules were promulgated in 1937 and the *Erie* case was decided in 1938. Petitioners have lost sight of the fact that since the *Erie* case, the Federal Rules of Civil Procedure were amended by this Court in the years 1939, 1946, 1948 and 1951, after hundreds of decisions had applied Rule 43(a). Notwithstanding all of those amendments the Supreme Court did not change one whit the language of Rule 43(a). Further, during the past month the Advisory Committee on Civil Rules appointed by the Chief Justice of the United States for the study of procedural rules has drafted proposed amendments to such rules. These proposed amendments are printed in the beginning of volume 295 F. 2d. That exceptionally learned group makes no recommendation whatsoever to change the language of Rule 43(a). We submit that the foregoing constitutes irrefutable evidence that *Erie* v. *Tompkins*, did not render 43(a) obsolete as is maintained by petitioners.

The third reason advanced by petitioners is that there is a conflict of decisions among the various circuits. We disagree with such contention and respectfully refer this Court to the learned opinion of the Court of Appeals, which discusses such problem fully (App., pp. A-1 to A-24). Particular reference is called to page A-13 where the Court distinguishes the cases from other circuits relied upon by petitioner, as purportedly in conflict, and concludes that the federal courts are unanimous in their application of Rule 43(a).

Petitioners' fourth reason, relying upon *Erie*, argues in effect that the Supreme Court of the United States has no power to promulgate rules of evidence governing trials in the federal courts. This argument is succinctly answered by Professor Moore in 5 *Moore's Federal Practice*, at page 1310 as follows:

"Rules of evidence should be treated within the domain of procedural law. The Supreme Court had recognized this principle before the advent of the Rules. The principle was acted upon by the promulgation of Rules 43 and 44 on evidence. The Court's position is supported by state practice, by the American Law Institute and, for reasons subsequently advanced, we do not believe that there is anything within the principles of *Erie R. Co.* v. *Tompkins*, which precludes the Court from regulating matters of evidence by rules of court." (Citing authorities.)

CONCLUSION

THE DECISIONS OF THE DISTRICT COURT AND OF THE COURT OF APPEALS ARE CORRECT. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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December, 1961.